

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA)
EX REL. KENNETH T. CUCCINELLI,)
II, in his official capacity as Attorney)
General of Virginia,)
)
Plaintiff,)
)
v.)
)
KATHLEEN SEBELIUS,)
As Secretary of the Department of)
Health and Human Services, in her)
Official Capacity,)
)
Defendant.)
_____)

No. 3:10-cv-00188-HEH

AMICUS CURIAE BRIEF OF LIBERTY GUARD
INTRODUCTION AND SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act (“the Health Care Act”) seeks to create a national health care scheme out of whole cloth by, *inter alia*, coercing individuals to purchase health insurance or pay a civil penalty. This governmental coercion infringes directly on a fundamental liberty. The right be free from governmental coercion, and the resulting freedom to not purchase health insurance, is a fundamental due process right, implicit in the concept of ordered liberty and deeply rooted in the nation’s history.

The freedom from governmental coercion is found as a common thread among all of the enumerated rights in the Constitution. If not written as a prohibition against Congress infringing such rights, each affirmative grant under the Constitution implicitly confers the prerogative to each individual to refrain from exercising their rights. Additionally, freedom from governmental coercion is implicit in the concept of liberty, for if the government is unrestrained from forcing individuals against their will, then liberty has only the meaning government deems fit to give. Insofar as freedom from governmental coercion is fundamental under the Constitution, the

burden is on the government to establish that the Health Care Act is narrowly tailored to further a compelling government interest.

The regulation of health insurance cannot be a compelling interest of the federal government. Health care and insurance are both heavily regulated by the several states, encompassed within the traditional notions of the police power and the general welfare. Congress wrote the coercive section of the Health Care Act to force healthy individuals into larger pools in an effort to lower premiums for others already purchasing insurance—so called “adverse selection.” Lowering the price of health insurance premiums pales in comparison to prior precedents, however, where a sufficiently compelling government has been found as a justification to government mandates.

Lastly, the Health Care Act surely fails the requirement of narrow tailoring because as stated, the federal government’s interest in lowering the price of insurance premiums could, for example, be furthered by simply subsidizing those who pay higher premiums directly. This would accomplish the interest without infringing on the fundamental liberty right of those who choose not to purchase health insurance.

ARGUMENT

I. Individuals Have a Fundamental Due Process Right to Not Purchase Health Insurance

A. The Right to be Free From Governmental Coercion is a Fundamental Right

The citizens of the United States possess a fundamental right to be free of government coercion. Put another way, citizens possess a fundamental right to not be forced against their will to exercise any other right. This freedom from government coercion is both “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) and *Palko v. Connecticut*, 302 U.S. 319 (1937).

Among the fundamental rights recognized by the Supreme Court of the United States are

those explicitly found in the Bill of Rights, including freedom of speech, religious belief, petition and assembly, and freedom of the press. U.S. Const. amend. I. Elsewhere, the Constitution prohibits the deprivation of “liberty...without due process of law” as against the States. U.S. Const. Amend. XIV, and against the Federal Government by way of the Due Process Clause of the 5th Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

The Supreme Court has also held that beyond the rights expressly granted by the Constitution, the citizens of the United States also possess implicit, fundamental unenumerated rights including the right to travel, *United States v. Guest*, 383 U.S. 745 (1966), the right to privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and the right to live among extended family, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). The Due Process Clause of the Fifth Amendment has traditionally protected unenumerated rights from infringement by the federal government. “No person shall . . . be deprived of life, liberty, or property, without due process of law” U.S. Const. amend. V. The Ninth Amendment, in light of its ratification history, grants protection to these unenumerated rights by stating, “The Enumeration in the Constitution, of Certain Rights, shall not be construed to deny or disparage others retained by the people.” U.S. Const. Amend. IX.

B. Freedom from Government Coercion is Deeply Rooted in This Nation’s History

A plain reading of all of the recognized fundamental rights of the citizens of the United States demonstrates that the freedom from government coercion is a thread common throughout the history and traditions of the United States. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Not only do each of the fundamental rights reserved to the people by the Constitution reflect this tradition, but also the express powers and prohibitions to the federal government reflect the cognizance of the Constitution’s drafters that the chief notion of liberty protected by

the Constitution is *freedom from governmental coercion*.

For example, the fundamental rights protected within the First Amendment include freedom of speech and religion. U.S. Const. amend. I. But along with those rights, the Constitution grants the freedom from giving coerced testimony in the 5th Amendment, and prohibits the Congress from establishing a religion and coercing citizens to participate in it. U.S. Const. amend. V and I. The Constitution mandates that people be free from being coerced by government into allowing police into their homes or searching their person, absent a warrant supported by a showing of probable cause. U.S. Const. Amend. IV.

As a converse, the Constitution limits the ability of government to interfere in the lives of the people who are otherwise living freely and lawfully. As mentioned above, government may search homes, but only when authorized to do so by warrant supported by probable cause. U.S. Const. amend. IV. Congress is forbidden from suspending the writ of habeas corpus, which protects the people from being restrained or coerced from moving about freely against their will without just cause. U.S. Const. art. I, § 9. When prosecuting a person in a criminal trial, the government is forbidden from holding a person indefinitely and required to try that person quickly and publicly. U.S. Const. amend. VI. Likewise, the government may not try a person twice for the same crime. U.S. Const. amend. V. Read together, these provisions of the constitution establish that when government regularly exercises its coercive authority over the people, its powers to do so are restrained. The Constitution presumes liberty. In explaining the reasoning behind its fundamental structure, James Madison wrote “to lay a due foundation for that separate and distinct exercise of the different powers of government, which, to a certain extent, is admitted on all hands *to be essential to the preservation of liberty*, it is evident that each department should have a will of its own...” Federalist No. 51. (emphasis added).

C. Freedom from being Coerced to Purchase is Implicit in the Concept of Ordered Liberty

Liberty, at its most basic sense, is the “freedom from arbitrary or undue external restraint, especially by a government,” but liberty also includes “the absence of a legal duty imposed on a person.” Black’s Law Dictionary (8th ed. 2004). The Patient Protection and Affordable Care Act (“the Health Care Act”) infringes on this second notion of liberty. The Health Care Act imposes on the people of the United States, collectively and individually, a new duty to purchase health insurance with required “minimum essential coverage.” Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1501A(b)(1). Crucially, the Health Care Act in this section does not tax, regulate, or control a person who is engaged in any positive conduct at all, but reaches individuals who are by its very definition engaged in *no* conduct at all. Freedom from this sort of coercion is implicit in any concept of ordered liberty.

At first blush, this use of government coercion may seem benign. After all, the government may argue that most people purchase health care insurance on their own or through their employers and a significant majority of those without insurance would do so were it more affordable. This reasoning is dangerous to all fundamental liberties. Imagine, for example, if Congress passed a law requiring people to purchase “minimum essential” food. After all, what could be more essential than “health,” but healthy food. Under the Health Care Act’s logic, most people already purchase their own food and many who cannot would do so were more food affordable. If there were nothing incongruous with liberty and the Health Care Act, then Congress would be permitted to require people to buy the “minimum essential” food it deems appropriate. If Congress is capable under the Constitution of so coercing the people, then it is impossible to fathom any limit to its powers under the Commerce Clause. This result cannot be countenanced against the Constitution handed down to us by the Framers. Writing on their intent to protect a broader scope of liberty in the Constitution, Justice Brandeis wrote, “They

conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

D. The Governmental Interest Furthered by the Health Care Act is Insufficiently Compelling and Not Narrowly Tailored

If Congress wishes to abridge the fundamental right to be free from governmental coercion, then such abridgement deserves heightened judicial scrutiny and a narrowing of the “presumption of constitutionality” of the legislation. *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938). The burden is on the government to justify an infringement of fundamental rights by demonstrating that the legislation is narrowly tailored to further a compelling governmental interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993). After identifying the rising costs of health care, and the problem of people waiting until injury to purchase health insurance, the Health Care Act identifies the government’s interest in the individual requirement as, “[s]ignificantly increasing health insurance coverage...will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.” Is lowering the price of health insurance premiums a sufficiently compelling government interest to justify governmental coercion? Is requiring individuals to purchase health insurance sufficiently narrowly tailored to achieve this interest? When compared to prior Supreme Court precedent, the Health Care Act fails this high standard.

For example, in *Hirabayashi v. United States*, the Supreme Court held that the plaintiff’s due process rights yielded to the exigencies of war-time emergency and the legitimate application of Congress’ war power. *Hirabayashi v. United States*, 320 U.S. 81 (1943). Likewise, in *Jacobson v. Massachusetts*, the Supreme Court held that the plaintiff’s right to refuse medical treatment yielded to the government’s interest in preventing a pandemic. The

rising cost of health care does not pose such a threat as disease or foreign invasion to justify an infringement of a fundamental right.

Requiring those without health insurance to purchase it does not further a compelling government interest in a narrowly tailored manner. The government compels those without coverage so as to aggregate those purchases with those it seeks to benefit. The requirement of minimum essential coverage does not at its core further the interest of those who fall under the clause's power, but only those who cannot afford insurance. As an alternative, Congress could easily raise revenues via its power to tax and then spend those revenues to subsidizing those who cannot afford to buy health insurance, just as it does for food and education—without infringing on the due process rights of the people. However, as currently written, the Health Care Act's provision does not conform to well-defined modes of constitutionally permissible taxation.¹

CONCLUSION

For these reasons, the Health Care Act is likely unconstitutional.

Respectfully submitted:

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¹ See Willis and Chung, *Of Constitutional De-Capitation and Health Care*, 127 TAX NOTES 9 (2010).

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CERTIFICATE

I certify that I will file this document with the Clerk of the Court through the Courts ECF procedures on this 17th day of June 2010, where the Clerk of the Court will issue a Notice of Electronic Filing to the following parties:

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